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91-235

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JAMES F. MCCrackIN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

August 8, 1991

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QUESTIONS PRESENTED

1. Whether the Secretary of the Air Force exceeded his authority or abused his discretion under 10 U.S.C., § 2005, in determining that Petitioner was not eligible for enlisted service.

2. Whether the Secretary of the Air Force had authority under 10 U.S.C., § 2005 to disregard and not abide by AFR 30-2, AFR 33-3 and AFR 53-3 in determining that Petitioner should be assessed education costs without first ordering him to active duty.



TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	14
APPENDIX A	1a
APPENDIX B	6a
APPENDIX C	19a
APPENDIX D	20a
APPENDIX E	24a
APPENDIX F	45a

TABLE OF AUTHORITIES

CASES:	Page
<i>Bluth v. Laird</i> , 435 F.2d 1065 (4th Cir. 1970)	7
<i>Brooks v. Clifford</i> , 409 F.2d 700 (4th Cir. 1969)	7
<i>Day v. United States</i> , 441 F. Supp. 165 (N.D., Tex. 1977), <i>reversed in part on other grounds</i> , 611 F.2d 1122 (5th Cir. 1980), <i>cert. den.</i> , 101 S.Ct. 316, 449 U.S. 919, 66 L.Ed.2d 146 (1980) ..	7
<i>Harper v. Jones</i> , 195 F.2d 705 (10th Cir. 1952), <i>cert. den.</i> , 73 S.Ct. 19, 344 U.S. 821, 97 L.Ed. 639 (1952)	6
<i>Kolesa v. Lehman</i> , (N.D., N.Y. 1984) 597 F. Supp. 463	14
<i>Morton v. Ruiz</i> , 94 S.Ct. 1055, 415 U.S. 199, 39 L.Ed.2d 270 (1974)	6
<i>Service v. Dulles</i> , 77 S.Ct. 1152, 354 U.S. 363, 1 L.Ed.2d 1403 (1957)	6
<i>United States v. Heffner</i> , 420 F.2d 809 (4th Cir. 1969)	7
<i>Wimmer v. Lehman</i> , (4th Cir. 1983), 705 F.2d 1402, <i>cert. den.</i> , 104 S.Ct. 484, 464 U.S. 992, 78 L.Ed.2d 681 (1983)	13
STATUTES AND REGULATIONS:	
10 U.S.C., Section 2005	3, 6, 9, 10, 11, 13
10 U.S.C., Section 9348	3, 13
10 U.S.C., Section 6959	3, 13
AFR 30-2	8
AFR 33-3	6, 7, 8, 9
AFR 53-3	3, 4, 5, 7, 9
REFERENCE BOOKS:	
<i>Webster's New Collegiate Dictionary</i> , 1977	9
<i>Britannica-Webster Dictionary & Reference Guide</i> , 1981	9

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. _____

JAMES F. MCCRACKIN,
v. _____ *Petitioner,*

UNITED STATES OF AMERICA,
_____ *Respondent.*

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

James F. McCrackin hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. (App. A, pp. 1a-5a). The opinion of the United States District Court for the District of South Carolina is reported in 736 F.Supp. 107. (App. B, pp. 6a-18a).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit sustained the trial court's decision by Opinion dated April 2, 1991. (App. A, pp. 1a-5a). Petitioner's timely Petition for Rehearing was denied on May 14,

1991 (App. C, p. 19a). This Petition is, therefore, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory and regulatory laws involved are 10 U.S.C., § 2005; 10 U.S.C., § 9348; AFR 30-2; AFR 33-3 and AFR 53-3 (App. D and E, pp. 20a-44a).

STATEMENT

This action was commenced by the United States to recover from McCrackin education costs for having attended the Air Force Academy, after his disenrollment from the Academy for misconduct. McCrackin answered by denying that he was liable for such costs and affirmatively pleading that he should have been ordered to active duty as an enlisted person rather than being discharged from the Air Force and assessed education costs.

The District Court had jurisdiction under 28 U.S.C., §§ 1345 and 1346(2).

There were no issues of fact for decision. McCrackin was appointed to the Air Force Academy in 1982. On April 15, 1982, he signed "Cadet Acceptance Record" (J.A. Exhibit 1, P. H1) consisting of Part I—Statement of Understanding, and Part II—Obligation to Serve. Pertinent parts of Part I—Statement of Understanding are as follows:

In connection with my acceptance of appointment as a cadet to the United States Air Force Academy, I am aware that upon entering the Air Force Academy of the United States I am required by law to serve in a military status (on active duty or in a Reserve Component) for a total of six years unless sooner discharged on grounds of personal hardship, in accordance with regulations and standards prescribed by the Secretary of Defense. I further understand that the following legal provisions will apply,

should my appointment as a cadet be terminated for reasons other than acceptance of a commission in a Regular or Reserve Component of the Armed Forces, or for physical disability:

* * * *

d. A cadet or midshipman who does not fulfill his agreement to complete the course of instruction and accept a commission may be transferred to the respective Reserve component in an appropriate enlisted grade and may be ordered to active duty for a period of time which cannot exceed four (4) years (Title 10, U.S.C. 4348b, 6959b, 9348b).

* * * *

He also signed a further "Statement of Understanding" (J.A. Exhibit 2, P. II) on the same date. Applicable parts thereof are:

I agree, as a condition of receiving advanced education as defined in Title 10, United States Code, Section 2005:

* * * *

(2) that if I fail to complete the specific educational requirements, I will serve on active duty for the specified period, and

(3) that if I voluntarily or because of misconduct, fail to complete that period of active duty, I will, as specified by the Air Force, reimburse the United States for the percentage of the cost of my education which the period not served on active duty is of the specified period, and

* * * *

These two understandings contained the requirements of 10 U.S.C., §§ 9348 and 2005, respectively. (App. D, pp. 20a-23a).

McCrackin was notified that the Academy was proceeding to separate him from cadet status for violating Paragraph 28a.(2), (4) and (6), AFR 53-3. (J.A., Exhibit 11, P. R1; App. E, pp. 39a-40a). The charges were lying on one occasion, use of marijuana on one occasion,

and failure to report another cadet for using a drug. He was given immunity by the Academy for testifying for the government against another cadet and this immunity applied to any trial, Article 15, UCMJ action, or proceedings under Paragraph 30, AFR 53-3. (J.A., Exhibit 7, P. N1).

Under pressure, McCrackin resigned from the Academy (not the Air Force) under Paragraph 18, § B, AFR 53-3, in lieu of proceedings under § E. (J.A., Exhibit 4, P. K1). In his response to the notification of proceedings he stated that he did not contest the allegations made against him, and that he understood that the Secretary would make the final determination of the type of separation documents to be issued. In addition to the contents of attachment 3 to AFR 53-3, (App. E, pp. 43a-44a) the following sentence was added to his Tender of Resignation: "My resignation is submitted with the understanding that a recommendation will be made to the Secretary of the Air Force that my active-duty service commitment [ADSC] be waived." There was no statement added to the Tender of Resignation that a recommendation would be made to the Secretary that education costs be assessed.

This resignation was submitted upon advice of military counsel appointed for McCrackin for the proceedings under § E. Counsel did not advise McCrackin that he could be charged for education costs if his ADSC were waived (J.A., Affid., P. G4), and McCrackin specifically requested an extension of time in which to enter active duty so he could complete his education (J.A., Exhibit 5, P. L1 and Affid. P. G4). He made no request for waiver of education costs; in fact, AFR 53-3 (12-8-82) did not provide for or allow such a request, and he was not advised to make such a request. The 1986 edition of AFR 53-3 was amended in this regard so that such a request for waiver may be made now by a cadet. AFR 53-3 (2-6-86), § A 8.(d).

Several documents in the proceedings against McCrackin indicated that he was eligible for enlisted service.

1. The Special Order dated May 23, 1985, (J.A. Exhibit 6, P. M1) relieving McCrackin from assignment contained the sentence, "Cadet is authorized leave pending separation from cadet appointment and call to active duty." 2. Record of Disenrollment (J.A., Exhibit 9, P. P1) for McCrackin contained a statement that he was not recommended for further officer training but gave no indication that he was not eligible for enlisted service. It further stated that his military and academic performance was above average. 3. The recommendation by the Superintendent to the Secretary (J.A., Exhibit 12, P. S1) indicated that McCrackin was eligible for enlisted service as it suggested that his ADSC be *waived*. It also stated that "Cadet McCrackin does not meet the standards for enlisted status . . ." but did not refer to any standards which guided the Superintendent. 4. The Acceptance of the Resignation (J.A., Exhibit 13, P. T1) by the Deputy Assistant Secretary stated that "The Secretary of the Air Force *waives* the requirement for active duty provided for in AFR 53-3. . . ." (Emphasis added).

The case was submitted to the trial court on motions for summary judgment by both parties, the facts not being in dispute. Judge Hamilton issued his Order dated April 13, 1990, in which he concluded that the Secretary of the Air Force acted within his discretionary power in determining that McCrackin was not eligible for enlisted service. He further held that the government was not estopped from assessing education costs by any action of appointed counsel for McCrackin.

The Court of Appeals for the Fourth Circuit affirmed the trial judge, stating the following:

(a) ". . . Since McCrackin failed to complete his active duty service commitment because of misconduct, the government may recoup its expenses. . ." (App. A. pp. 2a).

(b) "The Secretary's determination to waive McCrackin's service commitment under Section 2005 due to his misconduct is a matter of discipline. . . . Because the Air Force determined that McCrackin's misconduct disqualified him from enlisted service, the Air Force is entitled to recover its expenses under Section 2005. . . ." (App. A, pp. 3a-4a).

(c) "Regulation 33-3 does not apply to this case, because it does not govern enlistment of cadets; nor does it purport to define misconduct under Section 2005. . . ." (App. A, p. 4a).

REASONS FOR GRANTING THE PETITION

This case is the first to arise under 10 U.S.C. § 2005 in which the Secretary ordered reimbursement of education cost without first ordering the cadet to active duty. (App. F, p. 45a). Petitioner believes the case to be of great importance for future actions under § 2005, and it is certainly of great importance to him.

In addition, the Court below failed to follow precedent of this Court in holding that the Secretary was not required to follow AFR 33-3 in determining the qualifications of Petitioner for enlisted service and in finding that the Secretary could find that Petitioner was morally disqualified for enlisted service. In reaching these conclusions, the Court below treated Petitioner uniquely in that he was deprived of rights simply because he was a cadet, while such rights are afforded both the officers and the enlisted personnel of the Air Force.

This Court has held that an agency, including the military departments, must abide by and follow its duly promulgated regulations. *Service v. Dulles*, 77 S.Ct. 1152, 354 U.S. 363, 1 L.Ed.2d 1403 (1957); *Morton v. Ruiz*, 94 S.Ct. 1055, 415 U.S. 199, 39 L.Ed.2d 270 (1974). These regulations should be enforced and obeyed until amended or revoked by the agency. *Harper v. Jones*, 195 F.2d 705 (10th Cir. 1952), *cert. den.*, 73 S.Ct. 19, 344

U.S. 821, 97 L.Ed. 639 (1952). Duly promulgated regulations of an agency have the force of law. *Day v. United States*, 441 F.Supp. 165, (N.D., Tex. 1977), reversed in part on other grounds, 611 F.2d 1122 (5th Cir. 1980), *cert den.*, 101 S.Ct. 316, 449 U.S. 919, 66 L.Ed.2d 146 (1980).

The Court of Appeals for the 4th Circuit in this action did not follow this Court's decisions in *Service* and *Ruiz*, *supra*, nor its own prior decisions in *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970); *Brooks v. Clifford*, 409 F.2d 700 (4th Cir. 1969); and, *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969).

AFR 33-3 sets forth enlistment criteria for the Air Force. Nowhere therein does it describe conduct that McCrackin was charged with as disqualifying one for enlisted service. Paragraph 1-8(c) and (d) refer to moral disqualifications and drug offenses. McCrackin's conduct does not fit under any of the terms stated in these subparagraphs or the Tables and Figures referred to therein (App. E, pp. 24a-35a).

The Government suggested and the Court of Appeals noted that McCrackin's resignation in lieu of action under § E of AFR 53-3 could amount to an adjudication of the charges. This is contrary to the definition of the terms as set forth in 1-1.i. of AFR 33-3 in effect at the time (App. E, p. 24a). The definition specifically includes UCMJ offenses. It does not allow an adjudication except by "a court, judge, or other authorized adjudication authority . . ." Thus, the Secretary's acceptance of McCrackin's resignation cannot be an adjudication as the Secretary is not "an authorized adjudication authority."

This Court in *Ruiz*, *supra*, stated the purposes of the Administrative Procedure Act as follows:

The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promul-

gated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations. See generally S. Rep. No. 752, 79th Cong., 1st Sess., 12-13 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess., 21-23 (1946). That Act states in pertinent part:

"Each Agency shall separately state and currently publish in the Federal Register for the guidance of the public—

* * * *

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 522(a) (1).

The sanction added in 1967 by Pub. L. 90-23, 81 Stat. 54, provides:

"Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Ibid.*

In this case the 4th Circuit and the district court have sanctioned the Secretary's *ad hoc* determination of the eligibility of Petitioner for enlisted service, completely disregarding regulations containing criteria for enlistment and how Air Force personnel were to be treated if involved with drugs. The provisions of AFR 33-3, § 1-8 c. and d. (App. E, pp. 24a-35a) do not disqualify Petitioner from enlisted service. Likewise, the provisions of AFR 30-2, §§ 3-31 b. (2) and (4) (App. E, pp. 36a-38a) do not provide for the discharge of an airman or officer for a first offense use of marijuana.

The Academy treated the offenses alleged against Petitioner as not warranting trial by court martial by appointing an investigating officer, and subsequently, a

hearing officer. (See § E, Paragraph 27, AFR 53-3, App. E, p. 39a). Certainly, one offense under Article 15, UCMJ, would not disqualify a member of the Air Force from being eligible for enlisted service or be sufficient to remove or discharge him from the Air Force. As a cadet, Petitioner was subject to military law; he therefore, should have been accorded the benefits of the regulations.

The Secretary used throughout these proceedings the term "waiver" relating to Petitioner's ADSC. There being no definition of "waiver" in AFR 33-3, the usual meaning of the term should control. "Waiver" is defined as "the act of intentionally relinquishing or abandoning a known right, claim, or privilege; also: the legal instrument evidencing such an act." *Webster's New Collegiate Dictionary*, 1977; "the act of waiving a right, claim or privilege 2: a document containing the declaration of a waiver." *Britannica-Webster Dictionary & Reference Guide*, 1981. Thus, the Secretary and the Academy from the beginning acknowledged that Petitioner was eligible for enlisted service. Otherwise, they would not have used the term "waiver." The Secretary waived the obligation which Petitioner owed the government. However, the Secretary could not waive an obligation of Petitioner without his consent under § 2005 and then order into effect a duty to pay education costs, which but for the waiver would not be owed by Petitioner to the government. Yet, this is exactly what has occurred in this case.

The general discretion given to the President and the military commanders under him authorized by 10 U.S.C. § 16 is not here involved. Petitioner does not question that discretion. See *Harper, supra*. However, Petitioner contends that § 2005 does not give the Secretary discretion in determining the eligibility of a cadet for enlisted service. This is governed by AFR 33-3.

If Petitioner was not disqualified for enlisted service by reason of his conduct, then the Secretary had no dis-

cretion under § 2005 to elect whether Petitioner would serve his ADSC or reimburse for education costs. The statute required McCrackin first to serve his ADSC, and if he failed to serve all or part of that commitment, then he was required to pay the education costs for the period not served. If the Secretary had any discretion in determining McCrackin's eligibility for enlisted service, he abused it under the circumstances of this case.

In 1983, after McCrackin's contract was executed, § 2005 was amended to add subsection (f) as follows:

(f) The Secretary concerned shall require, as a condition to the Secretary providing financial assistance under section 2107 or 2107a of this title to any person, that such person enter into an agreement described in subsection (a). In addition to the requirements of clauses (1) through (4) of such subsection, any agreement required by this subsection shall provide—

(1) that if such person fails to complete the education requirements specified in the agreement, the Secretary will have the *option to order such person to reimburse the United States in the manner provided for in clause (3) of such subsection without the Secretary first ordering such person to active duty as provided for under clause (2) of such subsection and sections 2107(f) and 2107a(f) of this title; and . . .* (Emphasis added).

The emphasized terminology clearly shows that an option that does not exist under 2005(a)(3) was given to the Secretary of the Air Force for purposes of 2005(f)(1) to require reimbursement for education cost without first ordering the person (ROTC cadet) to active duty as required under 2005(a)(2). As no option existed under 2005(a)(3) for the Secretary, he was required to order McCrackin to active duty if he was eligible for enlisted service.

In this case the Secretary determined that McCrackin had breached the contract and forced his removal from

the Academy as a cadet. This triggered the requirement that Petitioner be ordered to active duty as an enlisted person. The Petitioners' conduct, while sufficient to cause his separation from cadet status, was not sufficient to keep him from serving his ADSC. He specifically asked for a delay in the call to active duty in order to complete his education (J.A., Exhibit 5, P. 11), and he had the right to enter active duty under the contract. He did not waive this right. The Secretary waived the government's right to such obligation of Petitioner. This waiver should, Petitioner contends, constitute a waiver of any liability for education costs.

The terminology contained in 10 USC § 2005 is not ambiguous, so resort to legislative history is not necessary. However, such history shows the purpose of 2005 as originally enacted and as amended in 1983. In Senate Report No. 96-850, page 6, we find:

The Committee recommends a change to current law to reimburse an agreement to serve on active duty or reimburse the Government for the cost of education when a person voluntarily withdraws from the ROTC program.

Under current law, when students in their junior and senior year drop ROTC voluntarily and in breach of their contractual agreement, they may be ordered to active duty as enlisted persons. According to the Department of Defense, *"The Services have been reluctant to invoke this option as it singles out ROTC students by involuntarily requiring them to serve on active duty as enlisted members in an otherwise volunteer force."* Although there may be merit to the suggestion that such people should be ordered to active duty, the Committee agrees that if they are in fact not ordered to active duty that they tional expenses. (Emphasis added).

At page 7, we find:

The purpose of the legislation is to add a new Section 2005 to title 10, United States Code, to au-

thorize the Secretary concerned to require an applicant for certain advanced education sponsored by the armed forces *to agree in writing to serve on active duty for a specified period or reimburse the United States for the cost of the education.* Unless a different period of active duty is prescribed by another law, the period of active duty in an agreement under this section shall be prescribed by regulation of the Secretary concerned. (Emphasis added)

If the applicant voluntarily or because of misconduct does not serve on active duty for the specified period and unless recovery were waived by the Secretary of the military department, or the Secretary of Transportation, the applicant will reimburse the United States for that percentage of the cost of the education that his unfulfilled active duty obligation is of the total service obligation incurred as a result of that education. . . . (Emphasis added)

Also at page 9 the following is of significance:

It should be noted that this legislative proposal would create no new substantive rights or obligations regarding service in the armed forces. This proposal merely authorizes the Secretaries of the military departments and the Department of Transportation *to enter contracts of the described kind and allows those contracts to be enforced in the usual way. The rights and obligations regarding an obligation to serve on active duty would then be determined under other law and the contracts.* (Emphasis added).

A part of H.R. Rep. 107, 98th Congress, 1st Sess. 214 (1983), is as follows:

The Committee recommends a change to the provisions authorizing recoupment of the cost of financial assistance if a participant fails to complete the education requirements specified in the ROTC agreement. The change would authorize the Secretary concerned to order such person to reimburse the United States for the full cost of assistance he or she re-

ceived plus interest. This provision would not prevent the Secretary from *ordering ROTC dropouts* to active duty in enlisted status; rather, it would provide the Secretary another option from which to choose in order to best meet the needs of the service.

The quoted portion of the report clearly shows that the Secretary would be given an option insofar as ROTC cadets were concerned but not Academy cadets. Before § 2005 was enacted, the only recoupment was through active enlisted service. After the 1983 amendment of § 2005 by adding (f), the Secretary had the option to require reimbursement of education costs from ROTC cadets without first ordering active duty. If the Academy cadets were qualified for active duty when discharged from the Academy, the cadet had to be ordered to active duty. This was the situation involving McCrackin.

The U.S. Navy has ordered cadets with worse conduct than that of McCrackin to serve in the enlisted ranks. The Fourth Circuit sustained an order of the U.S. Navy Secretary requiring a cadet to serve on active duty after he admitted possessing marijuana and sharing it on several occasions at the Naval Academy. *Wimmer v. Lehman*, (4th Cir. 1983), 705 F.2d 1402, *cert. den.*, 104 S.Ct. 484, 464 U.S. 992, 78 L.Ed.2d 681 (1983). The Fourth Circuit stated:

. . . The fact that an individual is discharged from the Academy, or is found to possess "insufficient aptitude to become a commissioned officer in the naval service," does not necessarily mean he could not be [a] competent seaman. It would be a great waste for the government to lose its investment in training what proved to be unsatisfactory midshipmen if it could not put them in a lesser spot which they were capable of filling. . . .

The statutory language pertaining to the U.S. Naval Academy is found in 10 U.S.C. § 6959 and is effectively identical to 10 U.S.C. § 9348 applicable to the Air Force Academy.

Another cadet was ordered to active enlisted duty even though he failed to report drug usage prior to enrolling in ROTC and forswore the abuse of drugs then and in the future. Later at a pre-commissioning physical examination, he admitted having used marijuana, hashish and and over the counter stimulants. *Kolesa v. Lehman*, (N.D., N.Y. 1984) 597 F.Supp. 463. This court cited *Wimmer, supra*, in reaching its decision.

What is involved here is really a simple contract. Its terms are not ambiguous. This was not an enlistment contract, but rather a contract to be educated in order to perform military service. The contract was breached by the cadet, and its plain terms state that he should then have been called to a term of active duty service in enlisted status. Only if the term of service were not then completed would the cadet have been liable for the payment of education costs.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals should be granted.

Respectfully submitted,

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August 8, 1991

APPENDICES

1

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1493

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES F. McCRACKIN,
Defendant-Appellant.

Appeal from the United States District Court
for the District of South Carolina, at Florence
Clyde H. Hamilton, District Judge

Argued: January 8, 1991

Decided: April 2, 1991

Before NIEMEYER, Circuit Judge, BUTZNER, Senior
Circuit Judge, and YOUNG, Senior United States Dis-
trict Judge for the District of Maryland, sitting by desig-
nation.

Affirmed by unpublished per curiam opinion.

ARGUED: Earl Windell McCrackin, McCRACKIN,
BARNETT & RICHARDSON, Myrtle Beach, South Car-
olina, for Appellant. John Oldham McGinnis, Deputy
Assistant Attorney General, Civil Division, UNITED
STATES DEPARTMENT OF JUSTICE, Washington,

D.C., for Appellee. ON BRIEF: Stuart M. Gerson, Assistant Attorney General, Barbara C. Biddle, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; E. Bart Daniel, United States Attorney, Henry D. Knight, Jr.

PER CURIAM:

James McCrackin appeals from a summary judgment entered against him on a claim by the United States to recoup educational expenses for McCrackin's nearly three years of education at the Air Force Academy. Since McCrackin failed to complete his active duty service commitment because of misconduct, the government may recoup its expenses. Consequently, we affirm.

I

James McCrackin enrolled in the United States Air Force Academy in 1982. As part of his enrollment he signed a Statement of Understanding, dated April 15, 1982. In May 1985 the Commandant of the Air Force Academy charged him with using marijuana, with denying—while under oath—that he used marijuana, and with failing to report another cadet's use of marijuana. McCrackin subsequently consulted with a member of the Judge Advocate General's Corps concerning his rights. He then tendered his resignation, which he "submitted with the understanding that a recommendation will be made to the Secretary of the Air Force that any active-duty service commitment be waived."

The Commandant recommended that the Secretary of the Air Force accept the resignation. The Commandant also recommended that McCrackin "does not meet the standards for enlisted status and should be required to reimburse the United States for the percentage of the cost of his education as agreed to." The Secretary, in accordance with 10 U.S.C. § 2005 and McCrackin's Statement of Understanding, accepted McCrackin's resignation and

required him to pay for his educational expenses. The Statement of Understanding to which the Secretary referred provided in part:

I agree as a condition of receiving advanced education as defined in Title 10, United States Code, Section 2005:

* * *

(3) that if I voluntarily or because of misconduct, fail to complete that period of active duty, I will, as specified by the Air Force, reimburse the United States for the percentage of my cost of my education which the period not served on active duty is of the specified period. . . .

In July, the Secretary discharged McCrackin under honorable conditions. The government subsequently sued for \$41,064.50 in educational expenses; McCrackin counterclaimed for \$807.85 in educational expenses withheld from his pay as a cadet.

II

McCrackin alleges in this appeal that he is entitled to complete his service commitment in place of reimbursing the Air Force for educational expenses.

The Secretary has broad discretion under 10 U.S.C. § 2005 to determine the eligibility of cadets for service and to require reimbursement. 10 U.S.C. § 2005(a)(3) provides:

[I]f such a person, voluntarily or because of misconduct, fails to complete the period of active duty . . . such person will reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided such persons as the unserved portion of the active duty bears to the total period of active duty such person agreed to serve.

The Secretary's determination to waive McCrackin's service commitment under § 2005 due to his misconduct is

a matter of discipline. As such it is entitled to great deference. See *Chappell v. Wallace*, 462 U.S. 296, 300-02 (1983); *Berry v. Bean*, 796 F.2d 713, 716 (4th Cir. 1986). Because the Air Force determined that McCrackin's misconduct disqualified him from enlisted service, the Air Force is entitled to recover its expenses under § 2005.

McCrackin relies upon Air Force regulations to establish that he is entitled to complete his service commitment. Under Air Force Regulation (AFR) 33-3, civilians are barred from enlistment because of arrest for marijuana usage only when the arrest results in "conviction or adverse adjudication." AFR 33-3(1-8)(d)(1)(b)(1). McCrackin argues that he was never convicted and that, therefore, he cannot be excluded from enlisted service.

Regulation 33-3 does not apply to this case, because it does not govern enlistment of cadets; nor does it purport to define misconduct under § 2005. The government also points out that even if AFR 33-3 were applicable, the Secretary could still have found McCrackin ineligible because the drug charges resulted in an "adverse adjudication": the charges were dropped only in return for his resignation. Moreover, AFR 33-3(1-8)(c) disqualifies a candidate of "questionable moral character"; the Secretary could reasonably determine that McCrackin's sworn denial of the use of marijuana and his failure to report drug abuse of a fellow cadet satisfied that condition. It is unnecessary to reach these issues, because 10 U.S.C. § 2005, the Statement of Understanding, and McCrackin's resignation sustain the Secretary's discretion to require reimbursement of educational expenses.

Finally, McCrackin alleges equitable estoppel, because the counsel provided to him by the Air Force did not inform him of the consequences of requesting waiver of his service commitment. The Supreme Court recently foreclosed estoppel arguments against the government

“where public monies are at stake.” *Office of Personnel Management v. Richmond*, 110 S.Ct. 2465, 2473, 2475-76 (1990). The principle is the same when the government seeks to recover money improvidently expended. *United States v. Fowler*, 913 F.2d 1382, 1385-86 (9th Cir. 1990). Accordingly, the district court’s judgment is affirmed.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

C/A No. 4:88-3125-15

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES F. MCCrackIN,
Defendant.

ORDER

[Filed Apr. 13, 1990]

The United States of America (government)- seeks reimbursement of the educational cost required to enroll James F. McCrackin (McCrackin) at the United States Air Force Academy (Academy) for three years because of the administrative determination that McCrackin was ineligible to fulfill his active duty service commitment (ADSC) upon his resignation from the Academy on May 16, 1985. The matter is before the court upon cross-motions for summary judgment. Rule 56, Fed. R. Civ. Proc. The court has concluded that the government's motion for summary judgment should be granted.

The instant action arises out of McCrackin's appointment to the Academy in 1982. As a prerequisite to admission to the Academy, McCrackin signed a "Statement of Understanding," which provided:

STATEMENT OF UNDERSTANDING

I agree as a condition of receiving advanced education as defined in Title 10, United States Code, Section 2005:

- (1) to complete the educational requirements specified in this agreement and to serve on active duty for the period specified in this agreement, and
- (2) that if I fail to complete the specific educational requirements, I will serve on active duty for the specified period, and
- (3) that if I voluntarily or because of misconduct, fail to complete that period of active duty, I will, as specified by the Air Force, reimburse the United States for the percentage of the cost of my education which the period not served on active duty is of the specified period, and
- (4) that only the Secretary of the Air Force or this designee may excuse me from my obligations to serve on active duty for the period specified in this agreement.

Defendant's Motion for Summary Judgment (Defendant's Motion), Exhibit 2. Under the terms of the Statement of Understanding, if a cadet voluntarily or because of misconduct failed to complete his or her ADSC, the Air Force could require reimbursement of education costs incurred by that cadet.

On May 9, 1985, McCrackin received a letter from Brigadier General Marcus A. Anderson, the Commandant of Cadets at the Academy. In this letter, General Anderson accused McCrackin of using marijuana, maintaining under oath that he had not used marijuana, and failing to report a fellow cadet's use of marijuana as required by the Academy Honor Code. McCrackin was also in-

formed that action would be instituted against him "with a view of affecting [his] separation from cadet status." Defendant's Motion, Exhibit 11.

Rather than contest disenrollment under Section E, Air Force Regulation (AFR) 53-3, McCrackin tendered his resignation from appointment to the Academy on May 16, 1985, after consultation with appointed counsel, Captain Scott W. Singer. McCrackin tendered his resignation with the "understanding that a recommendation will be made to the Secretary of the Air Force that [his] active-duty service commitment be waived." Defendant's Motion, Exhibit 4. McCrackin executed a second "Statement of Understanding" on May 21, 1985, in which he requested a delay in his call to active duty to permit completion of undergraduate degree requirements at a civilian college or university. Defendant's Motion, Exhibit 5. McCrackin was also granted testimonial immunity to secure his truthful testimony in a military justice action involving Cadet Third Class Andrew F. Smith. Defendant's Motion, Exhibit 17. Apparently, McCrackin was also promised an honorable discharge in exchange for his cooperation.

On May 23, 1985, Lieutenant General Winfield W. Scott, Jr., Academy Superintendent, recommended to the Secretary of the Air Force (Secretary) that Cadet McCrackin be discharged under honorable conditions and that his ADSC be waived. Because McCrackin did not meet the standards for enlisted status, according to General Scott, he also recommended that McCrackin be required to reimburse the government for the cost of his three years at the Academy. Defendant's Motion, Exhibit 12. The Secretary accepted McCrackin's resignation in July 1985. He also directed that McCrackin "reimburse educational costs in accordance with Title 10, United States Code, Section 2005 and the Statement of Understanding [McCrackin] signed on April 15, 1982." Defendant's Motion, Exhibit 13. On October 4, 1985, Mc-

Crackin's indebtedness for three years at the Academy was calculated at \$41,064.50. The Air Force subsequently deducted \$807.85 from McCrackin's final pay and credited this amount against the government's claim for reimbursement of educational costs.

The government brings the present action seeking reimbursement for \$41,064.50. McCrackin has counter-claimed for the amount deducted from his pay, \$807.85. The parties have filed cross-motions for summary judgment. In his motion for summary judgment, McCrackin alleges that the terms of his appointment contract require the Secretary to order him to active duty *prior to* requiring reimbursement. McCrackin also contends the Secretary has waived the defendant's ADSC. He also argues that the Secretary should be estopped from collecting educational costs, allegedly because of advice by counsel which caused him to take action to his detriment. Specifically, McCrackin alleges that counsel did not advise him of the consequences of waiving his ADSC, and, in addition, that Captain Singer should not have been appointed as his attorney.¹ McCrackin also contends that reimbursement should not be required because he was eligible for enlistment at the time of the Secretary's determination. Finally, McCrackin urges the court to exclude the Declarations of Lieutenant Colonel George J. Guyer (Guyer), November 30, 1989, and Captain Scott W. Singer (Singer), December 7, 1989, because they are not "sworn to" as allegedly required by Rule 56(e), Fed. R. Civ. Proc., and also contends that a letter of May 16,

¹ McCrackin's contention that Captain Singer should not have been appointed as counsel is summarily rejected by the court. Although McCrackin objected to the appointments of Captain Babinski as his counsel, he never objected to Captain Singer's subsequent appointment at any stage of the administrative proceedings. Also, Captain Singer did not serve as "hearing officer" in any Section E disenrollment proceeding because no such hearing ever occurred in McCrackin's case. Rather, McCrackin resigned and agreed to cooperate with Academy officials in lieu of contesting the allegations.

1985, produced by the government, should be excluded on grounds that it is not properly authenticated.

In support of its cross-motion for summary judgment, the government asserts that both the controlling statute, 10 U.S.C. § 2005(a)(3), and the Statement of Understanding signed by McCrackin on April 15, 1982, require reimbursement of education costs. The government also contends that considerable deference should be accorded to the Secretary's policy to require reimbursement only where a cadet fails to complete his or her ADSC voluntarily or because of misconduct. The Secretary's policy to require reimbursement when he determines that cadets are not qualified for active duty, according to the government, is also consistent with the intent of Congress when § 2005 was added to Title 10 in 1980. The government also maintains that equitable estoppel is not applicable under the present facts and circumstances, noting that the Secretary would have ultimately determined McCrackin was ineligible to fulfill his ADSC, and thus required reimbursement, even if McCrackin had not resigned but rather had been separated from cadet status under Section E, AFR 53-3. Additionally, the government argues that a government agency is not equitably estopped absent a showing of "affirmative misconduct."

As a threshold matter, the court must address McCrackin's contentions under Rule 56(e), Fed. R. Civ. Proc. That provision requires that "[s]upporting and opposing affidavits [] be made on personal knowledge, [] set forth such facts as would be admissible in evidence, and [] show affirmatively that the affiant is competent to testify to the matters stated therein." The following paragraph is contained in both declarations:

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Declaration of Lieutenant Colonel George J. Guyer, para. 10, November 30, 1989; Declaration of Scott W. Singer,

para. 5, December 7, 1989. The court concludes that the form of these declarations complies with both the letter and spirit of Rule 56(e). See 28 U.S.C. § 1746. Addressing the issue of the May 16, 1985, letter, it suffices to say that McCrackin has produced the identical letter as an exhibit to his motion. In any event, the declarations of Guyer and Singer, as well as the contested letter, are not material to the court's determination in this matter.

The statutory authority for the Secretary's decision to require reimbursement from McCrackin is found in 10 U.S.C. § 2005, which provides:

§ 2005. Advanced education assistance: active duty agreement; reimbursement requirements

(a) The Secretary concerned may require, as a condition to the Secretary providing advanced education assistance to any person, that such person enter into a written agreement with the Secretary concerned under the terms of which such person shall agree—

(1) to complete the educational requirements specified in the agreement, and to serve on active duty for a period specified in the agreement;

(2) that if such person fails to complete the education requirements specified in the agreement, such person will serve on active duty for a period specified in the agreement;

(3) that if such person, voluntarily or because of misconduct, fails to complete the period of active duty specified in the agreement, such person will reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided such person as the unserved portion of active duty bears to the total period of active duty such person agreed to serve; and

(4) to such other terms and conditions as the Secretary concerned may prescribe to protect the interest of the United States.

. . .

(c) Subject to the provisions of subsection (d) of this section, the obligation to reimburse the United States under an agreement described in subsection (a) of this section is, for all purposes, a debt owing the United States.²

In addition to express statutory authorization to require reimbursement, § 2005 also authorizes the Secretary to have each cadet sign a Statement of Understanding, which includes, among other things, an ADSC obligation if a cadet fails to complete the specific educational requirements, and the reimbursement obligation if a cadet, voluntarily or because of misconduct, fails to complete his or her ADSC. Defendant's Motion, Exhibit 2. Apparently, the reimbursement provision of AFR 53-3, which is congressionally authorized in § 2005, is triggered in cases where, as here, the nature of the cadet's misconduct acts as a bar to enlistment and renders him ineligible to serve on active duty. The Office of the Secretary considers the facts in each case to determine whether a

² Section 2005 was amended in 1983, and under subsection (f)(1), "the Secretary will have the option to order [R.O.T.C. Cadets] to reimburse the United States in the manner provided for in clause (3) of such subsection without the Secretary first ordering such person to active duty as provided for under clause (2)" By its express terms, however, this provision applies only to R.O.T.C. Cadets, and not Cadets enrolled at United States Military Academies. Thus, subsection (a)(3) remains the operative provision where an academy cadet voluntarily or because of misconduct fails to fulfill his or her ADSC. Because the court has concluded that the plain and unambiguous language of subsection (a)(3) requires reimbursement under the present facts and circumstances, the court need not reach McCrackin's argument that the addition of the 1983 amendment demonstrates that the Secretary cannot require reimbursement in the case of academy cadets. Indeed, the amendment itself is not even addressed to agreements executed by academy cadets.

cadet is qualified to serve on active duty as an enlisted member.³

The Secretary's policy to require reimbursement when he or she reasonably believes a separated cadet is ineligible to fulfill the ADSC is also consistent with the intent of Congress when § 2005 was added to Title 10 in 1980. *See* S. Rep. No. 96-850, 96th Cong., 2d Sess. (1980) (Senate Report). The legislative history states that, before the enactment of § 2005, the Secretary lacked

the authority to recover, in whole or in part, the expense of the education received by that person who fails to complete his course of education or his active duty obligation. This has led to situations in which the United States does not receive a fair return on its investment

Id. at 8. The report also reveals the purpose behind enactment of § 2005:

The purpose of the legislation is to add a new Section 2005 . . . to authorize the Secretary concerned to require an applicant for certain advanced education by the armed forces to agree in writing to serve on active duty for a specified period or reimburse the United States for the cost of the education. . . .

If the applicant voluntarily or because of misconduct does not serve on active duty for the specified period and unless recovery were waived by the Sec-

³ Significantly, AFR 53-3(C3)8.a.(1)(d) provides that each "separating cadet may submit a written request stating the reasons active duty commitment, and/or reinstatement, should be waived. This request, together with the recommendation of the Superintendent is forwarded to the Secretary of the Air Force for final action consistent with the best interests of the Force." McCrackin has not demonstrated that he availed himself of this administrative opportunity to be heard, and thus arguably has waived his right to subsequently attack the Secretary's ultimate determination.

retary . . . the applicant will reimburse the United States for that percentage of the cost of the education that his unfulfilled active duty obligation is of the total service obligation incurred as a result of that education. . . .

Id. at 7. Accordingly, it is clear that the Secretary's policy is consistent with § 2005 and the legislative history behind that provision.

It is also universally recognized, as noted by the plaintiff, that considerable deference is to be accorded to the military to resolve "uniquely military matters," such as the type of personnel decisions at issue presently. *Cf. Chappell v. Wallace*, 462 U.S. 296 (1983); *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Orloff v. Willoughby*, 345 U.S. 83 (1945). This policy is similar to the deference accorded administrative determinations generally. As stated by the Supreme Court:

The Secretary's interpretation may not be the only one permitted by the language of the [regulations], but it is quite clearly a reasonable interpretation; courts must therefore respect it.

Udall v. Tallman, 380 U.S. 1, 4 (1964). Thus, assuming the Secretary's determination is a reasonable interpretation of the applicable regulations, this court is precluded from reevaluating the issue of whether McCrackin was eligible for enlistment at the time of the Secretary's determination.

AFR 30-2, para. 3-2, promulgated on June 22, 1981, and in effect when McCrackin was discharged, provided Air Force policy on illegal drug use:

The Air Force objective is to maintain standards of behavior, performance, and discipline necessary for completing the mission. The illegal or improper use of drugs by Air Force members can seriously damage physical and mental health; may jeopardize their

safety and the safety of others; and can lead to criminal prosecution and discharge under other than honorable conditions. Drug abuse is not compatible with Air Force standards. . . .

"Drug abuse" is defined in the same regulation as "[a]ny illegal or improper use or possession, sale, transfer, or introduction on a military installation of drugs. . . ." *Id.*, para. 3-2(c) (5).⁴

In the present case, the Secretary's determination that McCrackin was ineligible to fulfill his ADSC was a reasonable discretionary decision which will not be disturbed by this court. The allegations against McCrackin, which included charges of illegal drug use and lying under oath, were not contested by McCrackin under the procedures governing disenrollment proceedings under Section E, AFR 53-3. Rather, he chose to resign and not contest the allegations. For purposes of the Secretary's decision, however, these allegations were necessarily the basis from which any decision as to McCrackin's fitness to fulfill his ADSC had to be evaluated. Under the facts and circumstances of the present case, the Secretary's decision to elect reimbursement is supported by § 2005, its legislative history, and regulations promulgated pursuant to

⁴ McCrackin's reliance on regulations which govern enlistment of recruits with no previous military experience has no application to cadets who are disenrolled or voluntarily separated from their Academy appointment because of misconduct. First, the premise of McCrackin's argument, that a separated cadet is entitled to the same treatment as an enlisted recruit, does not necessarily follow from the practical considerations involved in deciding whether a separated cadet should be permitted to serve his or her ADSC. For instance, in addition to McCrackin's alleged marijuana use, the Secretary also was constrained to consider his alleged lying under oath and refusal to report illegal activity by a fellow cadet. All of these considerations are relevant to the determination of whether McCrackin was fit for enlisted service. Indeed, arguably the allegations going to McCrackin's truthfulness and veracity are more relevant than his alleged drug use. Under these circumstances, a blind application of "waiver" rules for new recruits is not appropriate.

that provision. Accordingly, McCrackin's argument that reimbursement is not authorized under these circumstances must be rejected.⁵

Notwithstanding the clear and unambiguous application of § 2005 and the applicable regulations to the present case, McCrackin nonetheless argues that the government should be equitably estopped from collecting the cost of educating McCrackin for three years at the Academy. Initially, as noted by the government, it would be erroneous to conclude that McCrackin's counsel, Captain Singer, was vested with authority sufficient to usurp the statutory authority of the Secretary to enforce agreements entered into pursuant to § 2005. See *United States v. Vonderau*, 837 F.2d 1540 (11th Cir. 1988) (government not estopped from collecting indebtedness because of V.A. employee's oral assurances); *United States v. Killough*, 848 F.2d 1523 (11th Cir. 1988) (government not estopped from bringing civil action under False Claims Act despite alleged promise by Assistant United States Attorney to take no further action if individuals pled guilty and fully cooperated). In any event, the doctrine of equitable estoppel is only available where the allegedly injured party is ignorant of the true facts. *Preferred Risk Mutual Ins. Co. v. Thomas*, 372 F.2d 227, 230 (4th Cir. 1967); *Lavin v. Marsh*, 644 F.2d 1378, 1382 (9th Cir. 1981). Application of equitable estoppel to restrain administrative action against an individual also requires a showing of "affirmative misconduct" on the part of the agency. *Lavin*, 644 F.2d at 1382.

⁵ McCrackin's argument that the Secretary somehow "waived" his right to seek reimbursement must also be rejected by the court. In short, the Secretary's decision to seek reimbursement in lieu of ordering an allegedly unfit cadet to complete his ADSC constituted an election of alternatives under the statute and Statement of Understanding, and not a waiver of either statutory option. See Senate Report, *supra* p. 9, at 7.

Neither of these prerequisites to the application of estoppel is present here. As an initial matter, McCrackin can reasonably be charged with the knowledge of the Statement of Understanding he signed April 15, 1982. To hold otherwise would render such agreements unenforceable whenever a party has subjectively failed to remember his obligations thereunder. Moreover, McCrackin's allegation that Captain Singer failed to advise him of the consequences of waiving his ADSC falls far short of establishing "affirmative misconduct" on the part of the Air Force. In any event, the Secretary had the authority under the present circumstances to seek reimbursement—regardless of any purported "election of options" McCrackin intended to make after his resignation. Put simply, the doctrine of equitable estoppel has no application in the present case.

McCrackin received the benefit of nearly three years of college education at the taxpayers' expense. The Secretary's determination to seek reimbursement due to McCrackin's failure to complete his ADSC is well supported by § 2005, its legislative history,⁶ and the applicable regulations. Accordingly, the court is constrained to grant the government's motion for summary judgment. Defendant's motion for summary judgment is denied. Rule 56, Fed. R. Civ. Proc.

The Clerk is directed to enter judgment in favor of the plaintiff, United States of America, and against the defendant, James F. McCrackin, in the amount of forty-one thousand sixty-four and 50/100 (\$41,064.50) Dollars.⁷ The Clerk is also directed to enter judgment in favor of the plaintiff, United States of America, and

⁶ The Senate Report lists several instances where the government failed to receive a fair return on its investment prior to the enactment of § 2005. See Senate Report, *supra* p. 9, at 8.

⁷ The total cost of McCrackin's Academy education is not disputed. See Declaration of Ronald L. Latreille, February 22, 1990, para. 2.

against the defendant, James F. McCrackin, on the defendant's counterclaim.

IT IS SO ORDERED at Columbia, South Carolina, this 13th day of April, 1990.

/s/ Clyde H. Hamilton
CLYDE H. HAMILTON
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1493

Filed May 14, 1991

UNITED STATES OF AMERICA,
v. *Plaintiff-Appellee*

JAMES F. MCCrackin
Defendant-Appellant

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner with the concurrence of Judge Niemeyer and Judge Young, District Judge, sitting by designation.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX D

Title 10 U.S.C.

§ 2005. Advanced education assistance: active duty agreement; reimbursement requirements

(a) The Secretary concerned may require, as a condition to the Secretary providing advanced education assistance to any person, that such person enter into a written agreement with the Secretary concerned under the terms of which such person shall agree—

(1) to complete the educational requirements specified in the agreement and to serve on active duty for a period specified in the agreement;

(2) that if such person fails to complete the education requirements specified in the agreement, such person will serve on active duty for a period specified in the agreement;

(3) that if such person, voluntarily or because of misconduct, fails to complete the period of active duty specified in the agreement, such person will reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided such person as the unserved portion of active duty bears to the total period of active duty such person agreed to serve; and

(4) to such other terms and conditions as the Secretary concerned may prescribe to protect the interest of the United States.

(b) The Secretary concerned shall determine the period of active duty to be served by any person for advanced education assistance to be provided such person by an armed force, except that if the period of active duty required to be served is specified under another provision of law with respect to the advanced education assistance to be provided, the period specified in the agreement referred to in subsection (a) shall be the same as the period specified in such other provision of law.

* * * *

(f) The Secretary concerned shall require, as a condition to the Secretary providing financial assistance under section 2107 or 2107a of this title to any person, that such person enter into an agreement described in subsection (a). In addition to the requirements of clauses (1) through (4) of such subsection, any agreement required by this subsection shall provide—

(1) that if such person fails to complete the education requirements specified in the agreement, the Secretary will have the option to order such person to reimburse the United States in the manner provided for in clause (3) of such subsection without the Secretary first ordering such person to active duty as provided for under clause (2) of such subsection and sections 2107(f) and 2107a(f) of this title; and

(2) that any amount owed by such person to the United States under such agreement shall bear interest at the rate equal to the highest rate being paid by the United States on the day on which the reimbursement is determined to be due for securities having maturities of ninety days or less and shall accrue from the day on which the member is first notified of the amount due to the United States as a reimbursement under this section.

* * * *

§ 9348. Cadets: agreement to serve as officer

(a) Each cadet shall sign an agreement with respect to the cadet's length of service in the armed forces. The agreement shall provide that the cadet agrees to the following:

(1) That the cadet will complete the course of instruction at the Academy.

(2) That upon graduation from the Academy the cadet—

(A) will accept an appointment, if tendered, as a commissioned officer of the Regular Air Force; and

(B) will serve on active duty for at least five years immediately after such appointment.

(3) That if an appointment described in paragraph (2) is not tendered or if the cadet is permitted to resign as a regular officer before completion of the commissioned service obligation of the cadet, the cadet—

(A) will accept an appointment as a commissioned officer as a Reserve in the Air Force for service in the Air Force Reserve; and

(B) will remain in that reserve component until completion of the commissioned service obligation of the cadet.

(b) (1) The Secretary of the Air Force may transfer to the Air Force Reserve, and may order to active duty for such period of time as the Secretary prescribes (but not to exceed four years), a cadet who breaches an agreement under subsection (a). The period of time for which a cadet is ordered to active duty under this paragraph may be determined without regard to section 651(a) of this title.

(2) A cadet who is transferred to the Air Force Reserve under paragraph (1) shall be transferred in an appropriate enlisted grade or rating, as determined by the Secretary.

(3) For the purposes of paragraph (1), a cadet shall be considered to have breached an agreement under subsection (a) if the cadet is separated from the Academy under circumstances which the Secretary determines con-

stitute a breach by the cadet of the cadet's agreement to complete the course of instruction at the Academy and accept an appointment as a commissioned officer upon graduation from the Academy.

(c) The Secretary of the Air Force shall prescribe regulations to carry out this section. Those regulations shall include—

(1) standards for determining what constitutes, for the purpose of subsection (b), a breach of an agreement under subsection (a);

(2) procedures for determining whether such a breach has occurred; and

(3) standards for determining the period of time for which a person may be ordered to serve on active duty under subsection (b).

* * * *

APPENDIX E**AIR FORCE REGULATION 33-3****Chapter 1****QUALIFICATIONS FOR ENLISTMENT
IN THE REGULAR AIR FORCE**

1-1. Explanation of Terms. This paragraph explains terms and abbreviations used in this directive. Others not explained here are used according to AFR 11-1, volume 1 and AFR 11-2.

* * * *

i. **Conviction or Adverse Adjudication.** A conviction is the act of finding a person guilty of a crime, offense, or other violation of the law by a court, judge, or other authorized adjudication authority and includes fines and forfeiture of bond in lieu of trial. An adverse adjudication (adult or juvenile) is a finding, decision, sentence, or judgment, other than unconditionally dropped, dismissed, or acquitted. If the adjudicating authority places a condition or restraint that leads to dismissal, dropped charges, or acquittal, the adjudication is adverse. Suspension of sentence, pardon, not processed, or dismissal after compliance with imposed conditions is adverse adjudication. If a person is charged and convicted with violating any federal (including Uniform Code of Military Justice (UCMJ) offenses), state, or municipal law or ordinance, that conviction is considered an adverse adjudication.

* * * *

1-8. Waivers of Enlistment Eligibility Criteria:

* * * *

c. **Moral Disqualification.** Applicants convicted or adversely adjudicated of offenses as indicated in table 1-3 are ineligible to enlist without waiver. On applicant's request, recruiter submits a documented application for waiver to the approval authority indicated.

d. Illegal Drug Usage. Applicants who are drug abusers or diagnosed as alcoholics are not eligible for enlistment.

(1) Drugs:

(a) Narcotics and Dangerous Drugs. Applicants are not eligible for enlistment if they have ever:

1. Been arrested for possession, use, sale, or transfer of narcotics or dangerous drugs that resulted in a conviction or adverse adjudication.

2. Used lysergic acid diethylamide (LSD), phencyclidine (PCP-"Angel Dust") or any other hallucinogen,

3. Used narcotics, cocaine, or dangerous drugs illegally, or

4. Ever been a supplier of narcotics or dangerous drugs.

(b) Marijuana. Applicants are not eligible for enlistment if they:

1. Have ever been arrested for possession, sale, use or transfer of marijuana which resulted in a conviction or adverse adjudication.

2. Are psychologically dependent or chronic users of marijuana, or

3. Have been a supplier of marijuana.

(2) Waiver policy concerning drug abuse is outlined in AFR 30-2.

* * * *

UNIFORM GUIDE LIST FOR TYPICAL OFFENSES

A. Minor Traffic Offenses (see note) :

- Blocking or retarding traffic.
- Careless driving.
- Crossing yellow line, driving left of center.
- Disobeying traffic lights, signs, or signals.
- Driving on shoulder.
- Driving uninsured vehicle.
- Driving with blocked vision.
- Driving with expired plates or without plates.
- Driving without license or with suspended or revoked license.
- Driving without registration or with improper registration.
- Driving wrong way on one-way street.
- Failure to comply with officer's directions.
- Failure to have vehicle under control.
- Failure to keep to right or in line.
- Failure to signal.
- Failure to stop for or yield to pedestrian.
- Failure to yield right-of-way.
- Faulty equipment (defective exhaust, horn, lights, mirror, muffler, signal device, steering device, tailpipe, or windshield wipers).
- Following too closely.
- Improper backing: backing into intersection or highway; backing on expressway; backing over crosswalk.
- Improper blowing of horn.
- Improper parking restricted area, fire hydrant, double parking, (excluding overtime parking).

Improper passing; passing on right, in no-passing zone; passing parked school bus, pedestrian in crosswalk (when not treated as reckless driving).

Improper turn.

Invalid or unofficial inspection sticker; failure to display inspection sticker.

Leaving key in ignition.

License plates improperly displayed or not displayed.

Operating overloaded vehicle.

Racing, dragging, contest for speed (when not treated as reckless driving).

Reckless driving (fine under \$100).

Speeding (when not treated as reckless driving).

Spinning wheels; improper start, zigzagging or weaving in traffic (when not treated as reckless driving).

NOTE: The above list is a guide; consider as minor, offenses of a similar nature and traffic offenses treated as a minor by local law enforcement agencies.

B. Minor Misdemeanor Offenses (see note) :

Abusive language under circumstances to provoke breach of peace.

Carrying concealed weapon (other than firearm); possession of brass knuckles.

Curfew violation.

Committing nuisance.

Damaging road signs.

Discharging firearm through carelessness.

Discharging firearm within municipal limits.

Disobeying summons.

Disorderly conduct; creating disturbance, boisterous conduct.

Disturbing peace.

Drinking liquor on train (other than club bar).

Drunk in public; drunk and disorderly.

Dumping refuse near highway, littering.

Fighting, participating in a brawl.

Fornication.

Illegal betting or gambling: operating illegal handbook, raffle, lottery, punch board, watching cockfight.

Juvenile noncriminal misconduct: beyond parental control, incorrigible, runaway, truant, or wayward.

Killing domestic animal.

Liquor: unlawful manufacture, sale, or possession, or consumption in public place.

Loitering.

Malicious mischief: painting water tower, throwing water-filled balloons, throwing rocks on highway, throwing missiles at athletic contests, or throwing objects at vehicle.

Possession of indecent publications or pictures.

Purchase, possession, or consumption of alcoholic beverages by minor.

Removing property under lien.

Removing property from public grounds.

Shooting from highway.

Shooting on public road.

Simple assault.

Trespass on property.

Unlawful assembly.

Vagrancy.

Vandalism: injuring or defacing public property or property of another; shooting out streetlights.

Violation of fireworks law.

Violation of fish and game laws.

NOTE: The above list is a guide; consider offenses of a similar nature as minor. In doubtful cases, apply the following rule: if the maximum confinement under local law is 4 months or less, treat the offense as minor.

C. Nonminor Misdemeanor Offenses (see note):

Adultery.

Assault consummated by battery.

Breaking and entering vehicle.

Check, worthless, making or uttering, with intent to defraud or deceive \$100 or less.

Conspiring to commit misdemeanor.

Contempt of Court (includes nonpayment of child support or alimony required by court order).

Contributing to delinquency of minor.

Desecration of grave.

Driving while drugged or intoxicated.

Failure to stop and render aid after accident.

Indecent exposure.

Indecent, insulting, or obscene language communicated directly or by telephone.

Leaving scene of accident (hit and run).

Looting.

Negligent homicide.

Petty larceny (value \$100 or less); stealing hub caps, shoplifting.

Reckless driving (fine of \$100 or over).

Resisting arrest.

Selling or leasing weapons to minor.

Slander.

Stolen property, knowingly receiving (value \$100 or less).

Unlawful carrying of firearms; carrying concealed firearm.

Unlawful entry.

Unlawful use of long distance telephone lines.

Use of telephone to abuse annoy, harass, threaten, or torment another.

Willfully discharging firearms so as to endanger life; shooting in public place. Wrongful appropriation of motor vehicle; joyriding; driving motor vehicle without owner's consent (if intent is to permanently deprive owner of vehicle, consider as grand larceny under (D Below)).

NOTE: The above list is a guide; consider offenses of comparable seriousness as nonminor misdemeanors. In doubtful cases, apply the following rule: If the maximum confinement under local law exceeds 4 months but not 1 year, treat the offense as a nonminor misdemeanor.

D. Felonies (see note):

Aggravated assault; assault with dangerous weapon; assault intentionally inflicting great bodily harm; assault with intent to commit felony.

Arson.

Attempt to commit felony.

Breaking and entering with intent to commit felony.

Bribery.

Burglary.

Carnal knowledge of female under 16.

Check, worthless, making or uttering, with intent to defraud or deceive (over \$100).

Conspiring to commit felony.

Criminal libel.

Draft evasion.

Extortion.

Forgery; knowingly uttering or passing forged instrument.

Grand larceny; embezzlement (value over \$100).

Housebreaking.

Indecent acts or liberties with child under 16.

Indecent assault.

Kidnapping abduction.

Mail matter: abstratcing, destroying, obstructing, opening, secreting, stealing, or taking.

Mails: depositing obscene or indecent matter.

Maiming; disfiguring.

Manslaughter.

Murder.

Narcotics or habit forming drugs; wrongful possession, use or sale.

Pandering.

Perjury.

Rape.

Riot.

Robbery.

Sedition; soliciting to commit sedition.

Sodomy.

Stolen property, knowingly receiving (value over \$100).

NOTE: The above list is a guide; consider offenses of comparable seriousness as felonies. In doubtful cases, apply the following rule: If maximum confinement under local law exceeds 1 year, treat the offense as a felony.

TABLE 1-1

CONDITIONS WHICH MAKE APPLICANT
INELIGIBLE TO ENLIST

STATUS

Applicants are ineligible when one of the following conditions exists:

- 1 Intoxicated or under the influence of alcohol or drugs at any time during enlistment processing.
- 2 Has questionable moral character; history of anti-social behavior, alcoholism, sexual perversion, homosexual activity, frequent difficulties with law enforcement agencies, history of psychotic disorders.
- 3 Has moral disqualification listed in table 1-3, received a presidential pardon for draft evasion, or has been involved with narcotics, marijuana, or other dangerous drugs (see note 1).
- 4 Enlistment is not clearly consistent with interest of national security (AFR 205-32).
- 5 Conscientious objector or person with personal beliefs or convictions which preclude unrestricted assignments.
- 6 Under restraint imposed by civil or criminal court or subject of a subpoena ordering attendance on some specified future date (includes those released from restraint on the condition of enlistment). See paragraph 1-1w for definition of restraint.
- 7 Civil or criminal charges filed or pending (includes those released from charges on condition of enlistment).
- 8 Receiving disability compensation from any federal or other agency.
- 9 Applicant has disqualifying physical impairment, disease, or medical condition (including history of psychosis).

- 10 On AD or ADT with any branch or component of the US Armed Forces.
- 11 Has any dependents under age 18 and without a spouse in household, or who is married to a military member or has a common-law spouse (see note 1).
- 12 Has more than one dependent under age 18 and not entitled to enlistment pay grade E-4 or above (see note 1).
- 13 Separated from active duty with the Regular Air Force for a period less than 93 calendar days.
- 14 Separated with Reenlistment Eligibility (RE) code that bars reenlistment (see notes 1 and 2).
- 15 Separated as a result of having been nonselected for reenlistment under the Selection Reenlistment Program (SRP) or having noncommissioned officer (NCO) status denied or vacated.
- 16 Separated while undergoing a period of observation on the Control Roster or while serving punishment (suspended or unsuspended) pursuant to Article 15, Uniform Code of Military Justice (UCMJ).
- 17 Separated with other than an Honorable Discharge Certificate (General Discharge), or with a DD Form 214 that reflects "other than honorable" (see note 2).
- 18 Separated for failure to meet acceptable standards of conduct or duty performance, unsuitability, misconduct, personal abuse of drugs, for the good of the service, national security, or conviction by court-martial (see note 2).
- 19 Separated because of physical disability or medical reasons (see note 1).
- 20 Separated in pay grade E-3 or lower after 6 months or more active duty (see note 1).
- 21 Discharged before completing 6 months active duty (see note 1). EXCEPTION: Members separated for failure to complete OTS or for underage.

- 22 Separated and charged with 5 or more days time lost (see note 1).
- 23 Separated with 16 or more years total active federal military service (TAFMS) (see note 1).
- 24 Retired, eligible for retired pay under any provision of law, or retired and serving on extended active duty (EAD) in a Reserve status.
- 25 Separated from a Regular component of the armed forces 5 or more years (adjust date of separation by years of satisfactory service with ANG or USAFR).
- 26 Separated from active duty in pay grade E-4 or lower after 6 years or more active duty.
- 27 Separated with 5 years or more active service in another branch of the armed forces (see note 3).
- 28 Has held a commission as an officer or warrant officer in any Regular or Reserve component except as provided in paragraph 3-7 (see note 4).
- 29 Separated with 6 or more months active duty in a Regular component of the armed forces and is not a US Citizen.

NOTES:

- 1. For exceptions, see paragraph 1-8.
- 2. Applicants with a General Discharge and whose RE code has been ungraded to "1" are exceptions to this rule and may be considered for enlistment if not otherwise ineligible by this table. Before processing applicants claiming this status, USAFRS will verify eligibility with HQ AFMPC/MPCMAE.
- 3. Exception is considered for applicants who have served satisfactorily with the ANG or USAFR for 2 preceding continuous years and possess a critical AFSC and enlist for directed duty assignment. See paragraph 1-1x for definition of "satisfactory service."
- 4. Warrant officers are eligible to apply for an Air Force commissioning or appointment program; however, if he or she fails to complete the program, enlistee is ineligible to revert to enlisted status in the Air Force. Warrant officers are not eligible for the College Senior Engineering Program (CSEP).

* * * *

TABLE 1-3
PROCESSING APPLICANTS WITH
MORAL DISQUALIFICATIONS

RULE	A	B	C
	If applicant has a conviction or an adverse adjudication for (see note 1)	and applicant wants to enlist in the Reg AF and the number of offenses is	then approval is delegated to (see note 2)
1	multiple minor traffic offenses (figure 1-1, para A)	six or more in any 1-year period	USAFRS
2	multiple minor misdemeanor offenses (figure 1-1, para B)	two or more	
3	nonminor misdemeanor offenses (figure 1-1, para C)	one or more	
4	Felony (figure 1-1, para D)		

NOTES:

1. Waiting periods after civilian restraint are as follows:

a. No waiting period is required following termination of parole, probation, or suspended sentence.

b. A 3-month waiting period is required after termination of confinement of 15 days or more for those convicted. (Does not apply to juvenile with an adverse adjudication.)

c. A 3-month waiting period after termination of confinement of 15 days or more for juvenile offenders is authorized when considered necessary by the Recruiting squadron commander or operations officer for Regular Air Force applicants.

d. A 2-month waiting period after termination of confinement of less than 15 days for those convicted or subject to adverse adjudication is authorized when considered necessary by the Regular or Reserve squadron commander or operations officer.

2. Disapproval authority is delegated to the USAF Recruiting squadron commander or operations officer for Regular Air Force applicants. Refer questionable cases to next higher headquarters within Recruiting Service. Figure 1-1 provides a uniform guidelist of typical offenses, minor traffic offenses, minor misdemeanor offenses (nontraffic) and felonies.

AFR 30-2—SOCIAL ACTIONS PROGRAM

PART TWO

DRUG AND ALCOHOL ABUSE CONTROL PROGRAM

3-2. Air Force Policy:

a. Policy on Drug Abuse. The Air Force objective is to maintain standards of behavior, performance, and discipline necessary for completing the mission. The illegal or improper use of drugs by Air Force members can seriously damage physical and mental health; may jeopardize their safety and the safety of others; and can lead to criminal prosecution and discharge under other than honorable conditions. Drug abuse is not compatible with Air Force standards. The Air Force is responsible for preventing drug abuse among its members; for identifying, treating, and restoring drug abusers to duty when feasible; for controlling duty assignments; and for disciplining or separating (or both) those who use or promote illegal or improper use of drugs.

* * *

3-3. Terms Explained:

* * *

c. Drug Terms Explained:

* * *

(5) Drug Abuse. Any illegal or improper use or possession, sale, transfer, or introduction on a military installation of drugs as explained in this regulation.

(6) Drug Abuser. One who has illegally or improperly used, possessed, transferred, or sold any narcotic substance, marijuana, or dangerous drug. Categories of abuse are determined, with the exception of (d) below, by the commander, usually in consultation with the RC. Categories of abuse are:

* * *

(b) Drug Experimenter. One who has illegally or improperly taken any narcotic substance, marijuana, or dangerous drug as explained in this regulation for reasons of curiosity, peer pressure, or other similar reasons.

* * * *

SECTION B—PROHIBITIONS, PENALTIES, AND CONTROLS ON DRUGS

3-4. Using, Possessing, Selling, Transferring, and Introducing Drugs:

a. Air Force military members and civilian employees who are subject to the Uniform Code of Military Justice (UCMJ) must not use, possess, sell, transfer, or introduce into a military unit, base, station, post, ship, or aircraft any dangerous drugs (including nonnarcotic drugs) as specified in paragraph 3-3c(3). Violations of these prohibitions are chargeable under two separate UCMJ articles as follows: Article 92 applies to dangerous drugs (including nonnarcotic drugs); and Article 134 applies to marijuana or any habit forming narcotic drugs.

* * * *

3-31. Standards for Separating Members for Drug or Alcohol Abuse:

* * * *

b. Drugs:

* * * *

(2) Because drug abuse is not compatible with Air Force standards, it is essential that careful consideration always be given before keeping verified drug abusers in the Air Force. NCOs, in particular, are responsible for enforcing discipline standards according to AFR 39-6. NCO have responsibilities inherent in their status as leaders and managers, in many instances as first-time supervisors, to deter drug abuse and set an appropriate example. Accordingly, commanders are required to weigh those responsibilities carefully when determining the proper action to take in cases when NCOs are involved

in drug abuse. Each case must be determined on the specific circumstances, with full consideration given to Air Force policy of treating and restoring drug abusers to duty when feasible.

* * * *

(4) In most circumstances, commanders should normally withhold discharge action for first drug-related offenses. Subsequent failure to meet standards of conduct and duty performance may be a basis for discharge. Drug abusers who demonstrate an inability or unwillingness to take part in or complete a drug rehabilitation program are subject to discharge (see paragraph 4-1 for Air Force policy regarding initial refusals to cooperate).

* * * *

AIR FORCE REGULATION 53-3

DISENROLLMENT OF UNITED STATES
AIR FORCE ACADEMY CADETS**Section E—Disenrollment for Conduct Incompatible With Exemplary Standards of Personal Conduct, Character, and Integrity, or for Other Reasons**

27. Requirement for Investigaton. When information is received indicating that cadets have conducted themselves in a manner which, if the information is confirmed, would make their qualifications for continuation as a cadet doubtful but would not warrant trial by court-martial, the Superintendent will cause the case to be investigated. If, in the opinion of the Superintendent, the investigation discloses evidence indicating by reason of specific conduct that a cadet is disqualified for continued cadet status, the Superintendent will appoint either a Board of Officers according to AFR 11-31 or a hearing officer to hear the case. This course of action may be pursued notwithstanding any other administrative procedures which may apply to the case.

28. When a Hearing Is Considered Appropriate. Action under paragraph 30 is appropriate if the evidence indicates that any of the circumstances in this paragraph or similar circumstances exist:

a. Conduct is or has been incompatible with exemplary standards of personal conduct, character, and integrity. This is evidenced by the existence of one or more of the following or similar circumstances:

(1) Advocacy of political or ethical beliefs that would prevent fulfillment of the commissioning oath.

(2) Lying, cheating, or stealing, or toleration thereof.

(3) Repeated and dishonorable failure to meet financial obligations.

(4) The use, possession, transfer, or introduction into a military unit or installation of narcotics, dangerous drugs, or marijuana; or excessive or illegal use of alcoholic beverages.

(5) Willful failure to meet minimum standards of academic or military proficiency.

(6) Repeated failure to meet required formations or other military duties, either willfully or through gross indifference.

(7) Loss, destruction or waste of Government property under circumstances showing a gross disregard for public property.

(8) Repeated commission of minor offenses under either the UCMJ or the Commandant's disciplinary system.

(9) Commission of a serious offense triable by court-martial.

(10) Sexual misbehavior. This includes, but is not limited to:

(a) Lewd and lascivious acts.

(b) Homosexual acts, or attempts to engage in homosexual acts, or soliciting another to engage in a homosexual act. A board of officers convened according to AFR 11-31 is required in all cases. See AFM 39-12, Section H, for policy, definitions, and basis and type of discharge.

(c) Sodomy.

(d) Indecent exposure.

(e) Indecent acts with or assault upon a child.

(f) Transvestism or other aberrant sexual behavior.

(g) Other indecent acts triable by local, state, federal, or military jurisdictions.

b. Conviction by a civil court of any offense for which confinement for one year is an authorized punishment in the table of maximum punishments in the MCM, 1969 (Rev.), paragraph 127, or if a cadet is committed or confined to a state or federal medical institution by civil authorities.

c. Conviction by court-martial for any offense when confinement for one year is an authorized punishment and when a dismissal was not included within the approved sentence.

d. Information received shows that retaining a cadet may not be consistent with the interests of national security. The Academy will report the facts and circumstances to the local Office of Special Investigation (OSI) and will request an investigation. When the report of investigation is received, action will be taken as outlined in AFR 205-32.

e. Conduct prohibited by AFR 36-2.

f. Hazing. Cadets who request in writing a trial by general court-martial may not be separated except under sentence of the Court (10 U.S.C. 9352).

g. Paternity or maternity established by self-admission, court adjudication or other sufficient evidence, when the cadet has not tendered a resignation.

h. Fraudulent entry.

i. Pregnancy. When the cadet has not tendered a resignation or volunteered for leave-without-pay status.

29. Type of Hearing. If the Superintendent, or, in his absence, the Commandant of Cadets, determines the case

could result in no worse than an honorable or general discharge recommendation to the Secretary of the Air Force, the case may be processed using the hearing officer procedure. If the Superintendent, or, in his absence, the Commandant of Cadets, determines the case could result in recommending a discharge under other than honorable conditions, or if other sufficient reason exists, a board of Officers will be convened according to AFR 11-31.

* * * *

DEPARTMENT OF THE AIR FORCE
The Air Force Cadet Wing
USAF Academy, Colorado 80840

Reply to

Attn of: Cadet _____

[SEAL]

Subject: Tender of Resignation

To: Commandant of Cadets

1. Under the provisions of paragraph — Section —, AFR 53-3 I hereby voluntarily tender my resignation from appointment to the United States Air Force Academy now held by me for reason stated in paragraph 5, below.
2. I fully understand that if this resignation is accepted, I may be separated or discharged from my appointment to the United States Air Force Academy under other than honorable conditions and will be barred from future re-appointment and/or readmission to the United States Air Force Academy; and, further, may be declared ineligible for further officer training.
3. I understand that if this resignation is accepted it will in no way affect any obligation I may have to service under the Universal Military Service Act or other provisions of law that may now or hereafter require my service to the United States.
4. I have consulted a Judge Advocate officer prior to making my decision, and he has advised me of the rights and privileges available to me, explained resignation and its possible effects, court-martial procedures, my rights to counsel, and the effects of various forms of separation.

5. Reason for submission: _____

 (Cadet Signature Block)

The preceding statement of (cadet's name) was his/her decision, signed by him/her after he/she was fully counseled by me and after he/she was advised of his/her rights and privileges.

(Signature of Counsel)

 (Typed name, SSAN, grade, USAF)

APPENDIX F

DEPARTMENT OF THE AIR FORCE
Headquarters United States Air Force Academy
Colorado Springs, Colorado 80840

[SEAL]

4 Oct. 85

Reply to
Attn. of: ACF

Subject: Indebtedness—McCrackin, James Franklin,
248-94-0090, For \$41,064.50

To: HQ AFAFC/AJCR
Attn: G. Harris
Denver, Colorado 80279-5000

1. A review of the Cadet Pay account of Mr. James F. McCrackin has been completed. All itemized entitlements and deductions were examined and validated.
2. The letter at Attachment 1 reflects Mr. McCrackin's indebtedness for education costs for years 1983-1985 as \$41,872.35. A credit of \$807.85 is reflected on his final cadet worksheet (Atch 2). This credit is to be applied to the educational indebtedness. Therefore, the net indebtedness due to the Air Force is \$41,064.50 and should be collected as instructed by the Secretary of the Air Force (Atch 3).
3. As previously discussed by telephone, we are submitting this indebtedness account to your office for resolution and collection because this is the first case which involves Title 10, Section 2005. Should you have any questions, please feel free to contact me at autovon 259-3160.

/s/ John E. Henry
JOHN E. HENRY, Lt Col, USAF
Director, Accounting and Finance
Deputy Chief of Staff, Comptroller

4 Atchs

1. Ltr, USAFA/ACM w/Atch
2. Cadet Pay Worksheet
3. Ltr, USAF/MPPA w/Atch
4. Section E, AFR 53-3

cc: USAFA/JA
USAFA/DPY
J. F. McCrackin (w/W-2 and
CPITF Statement only)

